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Justice and Efficiency in Dispute Systems

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INTRODUCTION

Do methods of dispute resolution, such as mediation and negotiation that seek an accommodation rather than a formal zero-sum solution, render justice? This is a major theoretical and operational question raised by the increasing use of alternatives to formal methods of dispute resolution (ADR).[1] In this Article I explore the use of the underlying

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1. The classic "alternatives" are used far more often than litigation and courts. These methods include negotiation among parties to settle their own dispute, perhaps the oldest and most widespread, and methods which use neutrals such as mediation (third party acts as facilitator to help parties reach a decision); arbitration (third party selected by agreement of parties or law to resolve dispute); and conciliation (third party helps reduce tensions and explore solutions where parties have not agreed to resolve their differences). *See* REPORT BY THE AD HOC PANEL ON DISPUTE RESOLUTION AND PUBLIC POLICY, NATIONAL INSTITUTE FOR DISPUTE RESOLUTION , PATHS TO JUSTICE: MAJOR PUBLIC POLICY ISSUES OF DISPUTE RESOLUTIONS 36-38 (1983) [hereinafter NIDR Report]. However, an increasing number of new methods have excited interest and have resulted in greater uses of alternatives. Among the new methods are summary jury trials (evidence summarized before a jury is basis for probable verdict used by counsel to reach settlement); and mini-trials (matter argued in summary fashion by counsel before parties, who then attempt settlement). *See* D. Green, Recent Developments in Alternative Dispute Resolution, Remarks at the First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit (May 20, 1983), *reprinted in* 100 F.R.D. 499, 515-20 (1983). New methods in turn are leading to further innovations. *See* W. URY, J. BRET & S. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT (1988) [hereinafter W. URY, GETTING DISPUTES RESOLVED] (discussion of grievance mediation, in which after mediation fails, arbitrator hears brief presentation of case and offers oral advisory opinion to encourage settlement).

interests of the parties as a way to evaluate whether some alternative systems render justice.[2]

An interest-based approach to resolving disputes is an exercise in problem solving that seeks to remove unnecessary conflict by focusing on the underlying interests rather than the ostensible positions of the parties.[3] In appropriate cases an interest analysis may afford a way to evaluate justice as a function of outcomes instead of process.

Many traditional systems rely largely on rigorous procedures and decisions by neutrals or by jurors to justify the fairness of their results. However, assessments of justice that rest on the strength or integrity of procedural protection prejudge and condemn all but formal dispute resolution methods. ADR, on the other hand, may be legitimately challenged as potentially unfair because these methods do not use all the traditional procedural safeguards.[4]

Thus far, methodological issues have blocked study of issues of justice arising from varying dispute resolution methods and systems. The reality that dispute resolution devices differ in the procedural protection they afford necessitates a search for criteria other than regularity of process by which to evaluate them. Interests are necessarily subjective; but they allow an investigation and comparison across at least some fundamentally different dispute methods, negotiation and mediation, for example. As I seek to demonstrate in this Article, criteria for uncovering interests can be developed; and interests can be tested and subjected to analysis to test their validity as criteria for judging the fairness of outcomes. In view of the rapid spread of ADR, the question of how to compare alternatives to formal dispute mechanisms with those that provide formal protection must be pursued.

The assortment of methods that have begun to proliferate as alternatives to courts and other formal processes are likely to achieve the status

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2. I am using "justice" to mean outcomes that are fair to all the parties to a dispute in light of the facts and the equities surrounding the dispute. See *infra* text accompanying notes 39-53.

3. *See* R. FISHER & W. URY, GETTING TO YES; W. URY, GETTING DISPUTES RESOLVED, *supra* note 1. Although interest-oriented bargaining is a common form of negotiation, its structure and rationale have attracted special and wide-spread attention because of the work of Fisher and Ury. They have analyzed and popularized "standard based" or "principled" negotiation, a form of integrative or problem-solving, cooperative bargaining, as an alternative to distributive, positional negotiation. The authors press interest-oriented negotiations over zero-sum approaches, such as the determination of rights by courts or the exercise of power through conflicts, such as strikes or war. Whether interest-oriented approaches may in some cases be preferable because of the fairness or justice of the results is the question I address in this Article.

4. *See* Delgado, Dunn, Brown, Lee, & Hubert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

of dispute systems rather than simply dispute methods.[5] If so, two questions will arise. Can alternative systems achieve the structural integrity and coherence associated with formal justice systems? Are efficient alternative systems preferable to formal systems that have become highly inefficient or nonfunctional? These questions necessarily implicate issues of fundamental fairness. New systems are unlikely to be fully accepted unless they are regarded as adequate mechanisms for rendering justice.

Discussion of the fairness of ADR to the parties has been largely abstract because of the absence of a base of information. Thus to concretize my thinking, I use the example of the redesign of the complaint processing system at the Equal Employment Opportunity Commission (EEOC) during the years 1977 to 1981 because the issues that I raise in this Article had to be confronted in that effort.[6]

Part I of this Article discusses the limitations and obsolescence of many traditional dispute systems and the uncharted change toward greater use of alternatives. Part II questions the notion that nonfunctional formal systems render justice and then discusses the EEOC case processing reform and its conceptual basis. Part III offers an example of how an interest analysis can assist in evaluating the justice issues raised by an informal dispute system and encourages a further search for ways to evaluate whether formal and informal systems render justice.

I. Beyond Old and New Assumptions

At a time when the law is beset by enormous unattended problems of process,[7] there is little of the radical criticism these process problems

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5. *See* Ray & Clare, *The Multi-Door Courthouse Idea: Building the Courthouse of the Future*, 1 Ohio St. J. on Dis. Res. 7 (1985); Edelman, *Institutionalizing Dispute Alternatives*, 9 Just. Sys. J. 134 (1984). *See also* W. Ury, Getting Disputes Resolved, *supra* note 1. In using underlying interests in a discussion of dispute systems, Ury and his colleagues build on Getting to Yes, *supra* note 3, which Ury co-authored with Roger Fisher, and adopt its core concepts, its skills-building orientation, and the simple, clear language that gave the Fisher and Ury book a broad audience. The common conceptual bond between the two books is a focus on the parties' underlying interests, which when probed, may lead to a mutual posture of problem-solving rather than to adversarial positioning.

6. The EEOC administers Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, the Equal Pay Act, and § 501 of the Rehabilitation Act, all as amended. The reforms discussed in this Article were developed when the EEOC had responsibility only for Title VII of the 1964 Civil Rights Act, as amended, but later were applied to its other statutory responsibilities as well. After examining the reforms and their results, Congress transferred the additional job discrimination responsibilities from other federal agencies to the EEOC in the Civil Rights Reorganization Act of 1978.

7. For example, in the federal district courts, the pending civil caseload averaged 345 cases per authorized judgeship in 1979 compared to 425 in the equivalent representative year, 1988, despite an increase in the number of dispositions and a decrease in the number

might be expected to attract. Instead the profession retains an appetite for procedural formalism[8] that is at odds with often dramatic substantive changes with which the law has been identified in recent decades.[9] Lawyers, of course, are understandably at home with lawyer-dominated processes that facilitate their mandatory advocacy role in the representation of clients and that, incidentally, enhance the power and control of lawyers. They are less comfortable—or familiar—with processes that reduce the complexity, time, and cost of resolving disputes and that, incidentally, often increase the autonomy of clients. The legal culture, with traditional justice systems at its center, leaves many lawyers with the suspicion that efficiency and justice are incompatible.

Nevertheless, as courts strangle on their own processes and formalism escalates,[10] lawyers and judges increasingly are turning to alternatives to courts and other traditional processes.[11] This is as close as the law has come to institutional innovation, and it has been accompanied by little thinking about underlying theories of justice. Rather, the incentive to use new dispute resolution approaches has developed out of pressures to relieve the congestion that courts experience and the costs that clients pro-

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of judgeship vacancies—32 in 1988 and 28 in 1980. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 1970; ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1981; REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1988. The Senate Judiciary Committee recently commissioned a study of ways to reduce the costs and delays that attend federal litigation. *See* BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COST AND DELAY IN CIVIL LITIGATION (1989).

8. The litigation and formal filings generated by Rule 11 of the Federal Rules of Civil Procedure are an indication of the resiliency of formalism. Enacted to prevent frivolous filings and litigation, the rule appears to have encouraged more litigation than it has prevented. Boilerplate Rule 11 sanction motions, motions against attorneys who have filed Rule 11 motions, appeals from awards, and ancillary proceedings to determine appropriate sanctions are now common and increasing. *See* Note, *Has a Kafkaesque Dream Come True? Federal Rule of Civil Procedure 11: Time for Another Amendment?*, 67 B.U.L. REV. 1019 (1987).

9. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954) (state supported racially segregated schools violate the 14th Amendment); New York Times v. Sullivan, 376 U.S. 254 (1963) (importance of debate on public issues justifies requirement of "actual malice" before a public official may recover for libel); Griswold v. Connecticut, 381 U.S. 479 (1964) (constitutional right of privacy interpreted from amendments 1, 3, 4, and 5).

10. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), in which the Supreme Court replaced a straight-forward method of proof in job discrimination cases with requirements that will encourage costly depositions and litigation to uncover the necessary facts.

11. For example, the D.C. Superior Court, the trial court for the District of Columbia, cooperates with the D.C. Bar to hold settlement weeks periodically, during which lawyers help other lawyers to settle pending cases. Recently, of 703 cases in which mediation was attempted, 43% were settled and more than 80% of the participating attorneys were satisfied with the process and found it to be useful. THE WASHINGTON LAWYER, Oct. 1989, at 9.

test, or in the average individual's case, simply cannot afford.[12] Just as often, parties in other settings, such as jobs where disputes must be resolved, are turning from the traditional methods of those settings, such as arbitration.[13]

The new interventions are often innovative but ad hoc methods of resolution[14] adopted to augment or replace more formal methods perceived to be ineffective or overburdened. Even small changes in the way disputes are resolved may have potentially vast and perhaps unforeseeable consequences, however. The possibility that courts may become only one of several options officially encouraged to resolve disputes represents an unprecedented departure in the justice system, the consequences of which have not been thought through. In labor relations as well, changes in the traditional methods used to resolve union grievances can affect larger issues: perceptions of the justice of results and thus of the effectiveness of unions as representatives; the frequency and causes of strikes; the size of union treasuries as well as the cost of union dues, which bear part of the cost of arbitration; and ultimately the strength of unions themselves, at a time when union representation is as likely to depend on the tangible benefits it produces as on worker ideology or consciousness.[15] Whether in justice systems, labor relations, or other settings, those who develop new systems inevitably will have to account for such deeper questions, and not only for the more obvious and pressing issues of efficiency. At the same time, the procedural protections associated with formal dispute systems do not support the notion that severe inefficiency should be tolerated because, in the end, the parties are better off than they would have been in less formal systems.

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12. Although the United States has the greatest number of lawyers in the world and the highest rate per capita, 95% of legal services are provided to only about 1% of the population. *See* NIDR Report, *supra* note 1, at 8.

13. Arbitration is far less formal than litigation but over the years often has taken on the trappings of a legal proceeding. The rising cost of arbitration is attributed to "legalisms," especially the use of transcripts and post-hearing briefs. *See Responses to Costly, Litigious Arbitrations Assessed by Speakers at ABA Annual Meeting*, 160 Daily Lab. R. A-7 (Aug. 21, 1989). *See also* Goldberg, *The Mediation of Grievances under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. L. REV. 270 (1982); W. URY, GETTING DISPUTES RESOLVED, *supra* note 1.

14. *See supra* note 1.

15. Unions, which have steadily lost membership, are at 16.8% of the workforce today compared with 30% twenty years ago. Polls of nonunion employees in major corporations indicate that most feel that they do not need a union. In contrast, unions have been growing among service workers whose pay and benefits are low. *See* Risen, *Unions' Future Questioned After Summer of Setbacks*, Los Angeles Times, Aug. 25, 1989, at 6, col. 1; Siegal, *Labor Must Face Changing Society*, Chicago Tribune, Sept. 2, 1989, at 11.

II. The Calculus of Justice and Efficiency: A Case Study

A. *Justice: The Need for Evaluation*

How overburdened and inefficient must a system for resolving disputes become before it is open to question on the ground that it may no longer dispense justice? Are courts and other traditional mechanisms merely inefficient when they allow their processes to be sequestered for bouts of adversarial combat that may force an inequitable settlement on the party least able to tolerate the financial or human costs of lengthy litigation, or when traditional systems make litigants wait for years to be heard or to obtain a resolution? These and similar questions raise issues of enormous difficulty, but as ADR increasingly replaces more formal methods, such questions must be faced. The assumption that traditional justice mechanisms produce a quality of justice superior to that of other modes of resolution because of the panoply of procedural safeguards is untested. This is partly because no means have been developed to evaluate whether formal or informal systems in fact produce fair outcomes; partly because no attempts have been made to test whether procedural safeguards cause just outcomes; and partly because formal systems are simply assumed to render justice.

Of course, procedural rigor is meant to avoid the question of the fairness of outcomes. Procedural fairness substitutes for inevitably subjective ideas of what constitutes substantive justice. I do not suggest that evaluation of the outcomes of formal or informal systems is necessarily the way to test the extent to which all are effective in rendering justice. However, dependence on procedural safeguards at trial, such as the right to cross-examine and adherence to the rules of evidence, are inadequate and often irrelevant responses to long delays, procedural complexity, and high costs that put formal systems out of reach or alter or dilute results that might have been different if these same systems had functioned efficiently. Because they are deliberately process-based, traditional dispute systems, particularly courts, may avoid the question of the fairness of outcomes. What is unavoidable, at least for mechanisms that are dysfunctional, is skepticism concerning the results produced under such conditions.

The indispensable need for the formalities and safeguards associated with traditional justice systems is hardly open to argument. Functionally adequate formal justice systems need neither defense nor justification. Every day that they are used they demonstrate anew that formal justice is synonymous with due process. Nevertheless, modern disputes and the new pressures that they generate demand that appropriate ways be found to evaluate the quality of justice dispensed not only by new dispute

methods but by old ones, whose structural characteristics should not immunize them from scrutiny. This need is especially pressing today when so many courts and other traditional systems are overwhelmed not only by the number of matters filed but by a complexity never envisioned when these institutions were established.[16]

Instead of being evaluated, however, traditional systems continue to be tolerated, whatever their results and however obsolete these systems appear. There is still too little evidence even that a crisis of process in fact stimulates reform.

At the EEOC, however, I found a crisis that ran so deep and had become so public[17] that restructuring seemed to me to be the only viable solution. The Commission's burgeoning caseload and sophisticated statutory framework had outgrown the old-fashioned complaint process patterned on systems used by state and local civil rights agencies since the first ones were established in the 1940's.[18] The Commission's 125,000 case backlog and two-year time frame to resolve a simple complaint made a mockery of the formal administrative process, adopted by the Congress as an alternative to courts in order to speed resolutions and encourage conciliation. The original purpose to provide a way to resolve cases that was faster, less costly, more efficient, and less adversarial than litigation had long since been defeated. Backlogged cases and slow processing time were so entrenched that some rights organizations openly advised complainants against filing at the EEOC.

In a 1976 report, the General Accounting Office of Congress[19] found that the average time to process small individual complaints at the EEOC was two years, with some requiring seven years. Most charges

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16. For example, the rapid development of mass torts has brought new and difficult pressures on courts to accommodate large numbers of claims against a single defendant within formal systems which normally require individualized due process protection. *See* Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779 (1985); P. SCHUCK, AGENT ORANGE ON TRIAL, MASS TOXIC DISASTERS IN THE COURTS (1986).

17. I suspect that one of the reasons that courts do not encounter more pressure for reform is that, although they are public bodies, the effects of system breakdown is clear mostly in discrete cases while the aggregate breakdown is not captured easily and dramatically enough to garner the public outrage that is often necessary to spur wholesale reform. In contrast, by the time I arrived at the EEOC, its backlog was perhaps the best known fact about the agency and one for which it had been widely and publicly criticized.

18. However, the EEOC lacks the power to hold adversary hearings and issue orders. Its formal process features are a traditional investigation relying chiefly on interrogatories and demands for documents and a formal finding of cause or no cause to believe that discrimination exists; followed by conciliation in cause cases and the possibility of a de novo trial in federal district court, brought by the Commission or private parties, not only in cases where conciliation fails but also in no cause cases.

19. The data that follows here is drawn from GENERAL ACCOUNTING OFFICE, THE EQUAL EMPLOYMENT COMMISSION HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION 7 (Sept. 28, 1976).

were closed administratively, usually because the long wait had foreclosed any enforcement action or because the complainant could not be found or no longer desired to pursue a case that was so old. For cases that survived the wait, age had robbed most of their chances for remedies. Despite a statutory requirement to conciliate cases,[20] only eleven percent were settled, and a complainant had a probability of only one in thirty-three of obtaining a settlement in the year in which the case was filed. These and other inefficiencies of the case processing system had become notorious. Less often discussed was whether a system so clogged and dysfunctional could render justice.[21]

Redesign of a dispute system to include informal features necessarily raises the question of whether there will be a loss of rights. Whatever their shortcomings, systems that are controlled by neutrals, that provide procedural protection, and that follow precedents, reduce the effects of naked power that otherwise might determine or influence outcomes. Nevertheless, today formal systems have earned harsh criticism from both users and the public, who figure in the calculation of justice, costs and procedures that prohibit or limit access, lost opportunities, and the death of a matter from age caused by delay and decay.

In a society of increasing complexity in which there are daunting pressures on dispute systems, many that operate as they have for decades or even centuries, the simple distinction between justice and efficiency is artificial. We know much more about the efficiency of dispute systems, both formal and informal, than we do about the quality of the justice they produce. We are too sanguine that justice has been done because due process has not been violated.

B. *The Challenge of Systematic Reform*

Rethinking entire dispute systems is still rare. In the law, such rethinking would require a departure from the professional orthodoxy that courts invariably guarantee the best justice. When formal systems are palpably inefficient and exasperating and work visible hardship on users, this faith is not warranted. Yet not until system breakdown occurs or is

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20. Civil Rights Act of 1964, § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).

21. The best evidence that the system did not render justice was the near absence of remedies. A remedy-bearing process is not necessarily a just process, because it cannot be assumed that those who file should necessarily prevail. However, little more than ten years after the statute became effective, an 11% remedy rate for individual complainants appeared low. The fact that the remedy rate was subsequently raised substantially is some indication that the old process was unjustly denying remedies. *See infra* notes 43-49 and accompanying text. *See also infra* note 39.

imminent does change occur, if then. Although the formal process may be demonstrably ineffective or even nonfunctional, too often it continues to be used as if no other alternatives were conceivable.

Reform of a traditional dispute system does not usually eliminate its formal features, including the usual safeguards. Typically dispute system reform adds less formal, voluntary options, supplementing rather than replacing formal methods.[22] Affording a choice among methods of resolution adds options that may better suit some matters and enhances the autonomy of clients or other users to decide how they would prefer that the results be reached.[23] It is difficult to argue against increasing the choices people have for deciding their disputes,[24] especially when many traditional systems are so clearly fatigued and inadequate.

At the EEOC severe inefficiency amounting to a breakdown in the case processing system itself encouraged significant modifications. A three-step procedure placed at the beginning of the existing traditional complaint system consisted of an extensive professional intake interview, a fact-finding conference, and, where appropriate, a settlement attempt. This expeditious process, called Rapid Charge Processing (RCP), inserted at the front end of the process, most often avoided the need to turn to its more formal, traditional features, consisting of a more extended investigation and a formal finding. Most cases filed at the EEOC were small individual complaints for which RCP was well suited.

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22. *See* D. GREEN, S. GOLDBERG, & F. SANDER, DISPUTE RESOLUTION 8-9 (1985). Moreover, even mandatory alternatives, such as court-ordered arbitration, allow appeal of the decision or recourse to the usual formal process. *See Court Ordered Arbitration Issue*, DISPUTE RESOLUTION FORUM 3 (Aug. 1985).

23. This choice is no small matter because of the complexity of the motives for pressing disputes. For example, a supplier may want to continue doing business with a regular customer who is temporarily behind in its payments and therefore may be reluctant to bring a formal case in court. At the same time, the supplier wants to be paid and may find that the situation is best pursued through one of several alternatives to a lawsuit. A court decision may be the least desirable option even when the parties have pressed litigation to decide important matters of public concern. Two weeks before scheduled argument in Turnock v. Ragsdale, Doc. No. 88-79 (1988) before the U.S. Supreme Court, the Illinois attorney general, reportedly because of public attitudes that now favor fewer restrictions on abortion, negotiated a settlement with the American Civil Liberties Union, which feared further limitations on the right to abortion announced in Roe v. Wade, 401 U.S. 113 (1973). *See* Wilkerson, *Illinois Case on Abortion Settled, Averting Supreme Court Action*, N.Y. Times, Nov. 23, 1989, at 1, col. 1.

24. Most forms of dispute resolution, such as negotiation and mediation, require that both parties agree to the mode of resolution, while in court cases, one party—the landlord in a landlord-tenant case, for example—may unilaterally initiate the mode of resolution. Since the formal process usually remains an available option in any case, presumably the weaker party may go on to use it if he chooses, or may use its availability to increase his leverage in the informal process. This calculation can work in favor of a stronger party as well, but no more so than if a court suit is the only option.

By committing to the same process complaints that were simple and comprehensive, small and large, individual and class, the old complaint mechanism had been unable to allocate its resources rationally or to adjust its methodology intelligently. Staff spent enormous amounts of time pursuing individual complaints that they hoped might develop into class actions, almost always without success and almost always distracting time and attention from the individual's complaint until it was too late for either a successful finding or a settlement. At the same time, the Commission had no systematic way to develop class complaints.

The new process introduced functional differentiation matched to case type. RCP addressed only current and typical, small, individual complaints while the Commission developed two additional systems, one for processing class actions and another for eliminating the existing backlog of cases.[25] Because RCP received all new cases as of a designated starting date for the new system, it enabled the Commission to break the cycle that had guaranteed that each case would be old before it was processed because it had been placed at the rear of a large backlog. RCP for all new cases enabled the Commission to bring itself current, using a new processing method while giving specialized, focused attention to the backlog through a different process, a special Backlog Charge Processing System that committed the agency to a systematic reduction of the backlog.[26] This functional differentiation was conceived not only as a rational design for the administrative complaint process; it was a response to perhaps the most important lesson from the EEOC's own history—that one generic and unrefined system was not suitable for all kinds of matters.

Although settlement for appropriate cases was contemplated, RCP added a new system, not simply an alternative method to the existing process. The three distinct components—professional intake interview, fact-finding conference, and settlement procedure—like the parts of a car, were designed to function together.

The new system was based on a major assumption of the conciliation model on which the EEOC as well as state and local discrimination agencies are based: that the public policy to eliminate discrimination gives complainants and respondents compatible if dissimilar interests in a discrimination dispute. Complainants desire timely remedies. Respondents want to avoid liability but understand its inevitability in many

25. *See infra* notes 45-48 and accompanying text.

26. A separate staff was assigned to older cases in order to afford them specialized treatment and to reduce the inventory. Case managers and supervisors closely supervised these cases, including laying out the steps to be taken to resolve each case. Staff contacted charging parties to determine their availability and desire to proceed, and to seek additional case information. A settlement attempt or extended investigation in appropriate cases followed.

cases, and thus put a premium on reducing transaction costs, including time taken from their work to navigate the process. The public policy interests of a discrimination agency are consistent with those of both parties. The EEOC needed a timely process that would allow it to more effectively carry out the policy of the statute to eliminate discrimination.

These interests of the Commission, the complainant, and the respondent required an intervention that would avoid the long processing time required by the formal process while assuring that remedies would not be foreclosed in the name of efficiency. To meet these needs, the new system had to be remedy-oriented and expeditious. For the Commission, the remedy orientation of the new process was indispensable to its credibility because a remedy focus assured that RCP would be driven by justice considerations, not mere efficiency in disposing expeditiously of complaints. For complainants, the remedy focus acted as a quality control on settlement. For respondents who agreed to concessions, settlement provided both savings in transaction costs and the avoidance of a possible formal finding of discrimination.

At the center of RCP was a fact-finding process for early and unimpeded discovery of the essential facts. Because it was fact-oriented, RCP began with a professional intake interview like that performed by a lawyer when interviewing a client, replacing the mere docketing of the bare facts of a complaint by clerical employees. Professional investigators at intake were able to capture valuable and perhaps irretrievable information that might otherwise have been forgotten or lost, such as the names and addresses of witnesses. Extensive intake interviews typically took the Commission a considerable distance into the investigation itself, saving investigation time, efficiently uncovering facts while memories were fresh, and avoiding the destruction or loss of documentary evidence that sometimes occurs with the postponement of its retrieval.

Professionalized intake also linked justice with efficiency in an important way unrelated to the EEOC's investigation of cases. Many individuals who sought help at the EEOC had complaints that were not statutory discrimination matters. For example, a Hispanic complainant might wish to file a complaint against a large developer; an interview might reveal that the complainant was a tenant and not an employee and that this was therefore a landlord-tenant dispute. A black male might come in to file a discrimination complaint against his black male supervisor; the interview at intake, noting that both were from the same racial group, might reveal that the two had a history of personal disagreements not based on race. When clericals simply docketed complaints, large numbers of nonjurisdictional charges or matters inappropriate for a discrimination agency came into the system and took their places in the backlog until months or even years later. Many individuals lost the opportunity

for relief or had it delayed to their detriment, needlessly waiting out their time in the EEOC backlog. With RCP, professionals at intake, instead of accepting charges indiscriminately, counselled individuals immediately so that if a charge did not belong at the EEOC, the individual could be directed to where help was available. Thus, beginning at intake, the system sought justice for individuals by matching them with the appropriate vehicles for resolving their matters. At the same time, complaints that required other treatment did not delay complainants whose cases were appropriate for investigation under Title VII. Simultaneously, efficiency was served because a dramatic reduction in nonjurisdictional and other charges inappropriate for a discrimination process no longer came into the system.[27]

The second step in RCP was the fact-finding conference, the heart of the new process. Using the intake interview, an investigator prepared an interrogatory and forwarded it to the employer. The employer was summoned to appear, usually within a month, with her books and records. The Commission thus avoided the long periods of delay that accompanied more passive, traditional investigatory procedures. The fact-finding conference was a practical alternative to more sedentary paper investigations commonly used by complaint-taking agencies that allow respondents to effectively control the pace of the investigation and leave many openings for delay to avoid producing the necessary records and other evidence. Passive investigation techniques commonly used by government agencies depend heavily on communication through written demands for documents. The inevitable resistance to these demands occasionally led to laborious on-site visits to sift through records.[28] The same information now came out in one or two fact-finding conferences. With proactive fact-finding, the initiative and control remained with the Commission, and the facts got out faster, more extensively, and more forthrightly than they had previously during months of traditional processing.

The third step in the new process was a settlement attempt in appropriate cases, leaving the formal system of extended investigation and a finding of cause or no cause for more complicated cases. It is the fact-finding conference followed by the settlement attempt that most directly raises the justice issues inherent in ADR.

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27. Intake varied but was consistently down from the prior period when all charges were indiscriminately docketed. In the first year of testing RCP in the three model offices, the average reduction in charges received was 38%. *See* Percent Change in Charge Receipts (FY77-FY78) (EEOC chart on file at the Ohio State Journal on Dispute Resolution). No charges were rejected at intake without counselling and referral.

28. On-site investigation remained an option at the Commission's discretion, both to seek and to verify information.

C. *The Justice Challenge*

Is there a trade-off between the autonomy and satisfaction reported by users of ADR[29] and the procedural protection for parties associated with traditional methods? This question needs both empirical investigation and theoretical discussion. In putting the new system in place at the EEOC, however, we had to assume that fairness issues would arise and to include devices for assuring that RCP would effectively dispose of them.

At a discrimination agency, justice for complainants, in particular, is a central concern for two major reasons. First, the injustice and the historical experiences associated with their status are the *raisons d'etre* for the creation of the agency. Second, the statute embodies a strong public policy to eliminate discrimination experienced by individuals and groups and deemed harmful to society. Title VII does not provide parties with their own counsel at the initial stages of the process because the Commission is charged with performing the necessary investigatory and advice functions. At the EEOC, however, the employer representative could afford a lawyer more often than the complainant, although both parties generally appeared without lawyers.

In anticipation of disparities of power and resources between the parties, the EEOC trained investigators to be proactive fact-finders and charged them with assisting the parties in bringing out their version of the facts and with protecting weak parties against others who might have more experience, resources, or assistance. At the same time, lawyers who might accompany respondents[30] (or, more rarely, complainants) did not participate in the fact-finding session, although they could whisper advice to their clients. This limitation was necessary to keep the fact-finding conference from becoming a formal adversarial proceeding neither contemplated nor authorized by Title VII. In that case, the fact-finding conference would have enlarged the respondent's rights (the party most likely to have a lawyer) rather than maintaining them as they would have been had the Commission done the traditional paper or on-site investigation. Thus, without changing the character of the new process, the parties retained the right to consult counsel inside or outside the room

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29. *See, e.g.*, Hensler, *What We Know and Don't Know about Court-Administered Arbitration*, 69 JUDICATURE J. 270, 276 (1986) (survey of litigant satisfaction in four jurisdictions with significantly different rules showed "overwhelming majority" satisfied); *See also infra* note 11.

30. Significantly, after RCP was put into effect, company representatives reported that their experience with the process soon led them to send the appropriate personnel without lawyers, an expense they no longer felt necessary in light of the factual orientation of the process.

analogous to their right to consult counsel before answering questions submitted by way of written interrogatories in the traditional investigatory process.

The fact-finder was trained to play multiple roles. She was a neutral who controlled the process, a helper to the party needing assistance, and a mediator when settlement appeared possible.[31] Where appropriate, the fact-finder acted as a helper as a judge might if a party appeared pro se and the other side had counsel. This might mean drawing out facts that the complainant might overlook or restraining the actions of the respondent or her lawyer. At the same time, the fact-finder's function paralleled that of a mediator to help the parties reach an agreement. At the EEOC, this meant encouraging settlement, the mode of resolution preferred by the statute,[32] and as it turns out, the only practical method for a complaint system that receives tens of thousands of cases each year.

The fact-finder's role as a mediator most directly raises the question of justice in informal processes. The EEOC fact-finder was more than a facilitator; she was an activist encouraging an agreement in keeping with the facts, the applicable law, and the obligation of fairness to both parties. In encouraging settlement, the fact-finder necessarily characterized the evidence or the law based on her experience with similar factual situations and familiarity with the applicable precedents. This role carries the risk that the mediator may unfairly influence the outcome.

The activist mediator in encouraging settlement may be perceived as pressing settlement on an unwilling party.[33] However, the reality of the

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31. In an evaluation of RCP, the GAO characterized the EEOC fact-finder as a "moderator/advisor." GENERAL ACCOUNTING OFFICE, FURTHER IMPROVEMENTS NEEDED IN EEOC ENFORCEMENT ACTIVITIES 8 (1981) [hereinafter 1981 GAO Report].

32. *See supra* note 20.

33. *See* W. URY, GETTING DISPUTES RESOLVED, *supra* note 1, at 162. These authors say that, whatever its validity, this perception is "inevitable" in mediation, and they report that despite the successful use of their preferred method, grievance mediation, there was occasional criticism concerning pressure by mediators. This parallels the EEOC experience. The GAO recommended that the EEOC find "no cause" rather than encourage the settlement of inherently weak cases. The EEOC objected in its response that to avoid undermining the statute, such "no cause" findings could not be made without extended investigation of weak cases. Otherwise, the EEOC would be giving conclusive and unilateral weight to employers' claims, because they usually possess the relevant information, while the employee can obtain similar information only over a more extended time through investigative mechanisms. The Office of Management and Budget, also responding in the GAO Report, recommended more aggressive development of information prior to the fact-finding conference rather than refusing to settle weak cases. 1981 GAO Report, *supra* note 31, at ii, 64, 75. One of the most important factors influencing settlement is the huge number of cases that the EEOC receives every year. Despite a growing caseload that had reached 115,000 charges by 1987 the EEOC adopted a policy of fully investigating every case. The GAO found that in light of the volume of cases, this policy led investigators to systematically close cases without full investigation and to a doubling of the backlog between 1983 and 1987. GENERAL ACCOUNTING OFFICE REPORT TO REQUESTER, EEOC AND STATE AGENCIES DID

settlement dynamic in rights controversies, where claimants look to law or unionized employees to contracts, for example, is that resolution often is unlikely without frank assessments among the parties and the mediator. This should be a professional assessment, including the mediator's experience with similar matters and their outcomes. This role for the mediator is especially vital when the mediator is a government agency who, in facilitating agreements between individuals, is also carrying out an important public policy. A party should not be deprived of the necessary knowledge and assistance because she does not have a lawyer. The statutory role of the Commission is to investigate cases and guide the parties so that a lawyer is unnecessary. To carry out this role, the Commission fact-finder often helped the parties to evaluate the evidence in light of the settlement offered, especially questions of legal sufficiency and precedents involving similar facts.

For discrimination claims, in particular, whatever the actual facts or their legal effect, individuals who go so far as to file a formal complaint to assert what they believe to be their rights often do so with a feeling of entitlement or of personal violation. Respondents, whose view of the facts may be quite different, often adopt a defensive deep-pockets posture that assumes that an action has been brought because of their putative power or economic position. This is a recipe for deadlock.

In the event of a formal disposition, presumably the matter would be decided with the winner taking all. However, experience teaches that the chances for complainants to prevail in small individual discrimination cases is relatively slim because statutory discrimination is a circumscribed concept, because the evidence is usually circumstantial and elusive, and because the burden is on the complainant, who almost always has fewer resources and less power.[34] Even when the proceeding is placed in an agency with subpoena power and the facilities to investigate and bring out the facts, both the burden and the legal standard are unchanged, and both are likely to raise more difficulties for the challenger than for the respondent. At the EEOC the fact-finder met the concern for fairness in two ways— first by encouraging the free flow of information to maximize the discovery of facts that otherwise might be delayed or withheld (especially by the employer, who typically possesses most of the applicable records and documents); and then by conversations with

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NOT FULLY INVESTIGATE CHARGES 2, 3 (1988) [hereinafter 1988 GAO Report]. *See also infra* note 39.

34. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)(respondent need only articulate legitimate nondiscriminatory reason for action while claimant retains the burden of persuasion).

both parties concerning their rights and prospects in accordance with the evidence.

The fact-finding conference brought out the information on which each party based his view of the case. This process almost always produced new knowledge that in more formal proceedings or investigations might have been withheld for some time and obtained later only at the cost of time and resources. The old process, which featured formal paper investigations, often required repeated demands for information from employers and culminated in subpoena proceedings in court.[35] Fact-finding, on the other hand, was a face-to-face process that required that documents be physically produced at the fact-finding conference. Moreover, fact-finding, by clarifying matters otherwise known only to one party, often reduced the number of issues early, altering to one degree or the other the rigidity of the parties' initial stance.

In a typical case, suppose a man is promoted rather than a woman, despite her good performance evaluations. At the fact-finding conference, she learns for the first time that the man, whose qualifications appear marginally inferior to hers, received the promotion because his attendance and lateness record is superior. Her attendance and lateness record is not unsatisfactory but is more spotty, and close supervision of the employees in the unit is an important job-related qualification. At this stage, the evidence does not favor the complainant. Nevertheless, she is entitled to further investigation of her complaint because she is alleging unequal treatment, and deeper information from the employer would reveal whether, for example, men with attendance and punctuality records similar to hers had been promoted to this or similar jobs in the past. The employer would be obligated to produce a second and more elaborate set of records to satisfy this next investigatory step.

Thus far, fact-finding has demonstrated to both parties the major strengths and weaknesses of their positions. The facts produced have led both to understand that they might have something to lose if the matter goes further. Without a showing that men have not been held to the same standard and that therefore the lateness and attendance defense is a pretext, the complainant would be unlikely to prevail. On the other hand, even if the employer is reasonably sure that there was no disparate treatment, she would be put to the trouble of producing records and reports on perhaps many workers in order to show that she did not discriminate against one. Thus, fact-finding alone often may bring the parties to

35. Resort to subpoenas usually comes after considerable time has been spent seeking to obtain the requested information voluntarily. If the respondent raises objections to producing requested material or the subpoena is ignored, EEOC must initiate enforcement proceedings in court, introducing the "law's delay". *See* 42 U.S.C. § 2000e-9.

desire settlement based on an intelligent assessment of the facts and of the risks to each.

The more controversial aspect of the process comes in a second step involving mediation when settlement appears appropriate. In the EEOC process, active intervention often was necessary to help both parties, who were usually novices, come to grips with the information they had discovered in order to evaluate its strength in light of similarly situated facts and precedents.[36] In formal legal proceedings, such evaluations by the parties occur as the evidence is developed, with the result that in the great majority of cases, the parties either drop the matter or choose a settlement that they fashion rather than go to judgment by a neutral.[37]

The transaction costs incurred in disputes, along with the uncertainty of outcome, act as powerful incentives to settle. At the EEOC, the respondent, usually a business, has an interest in reducing transaction costs and avoiding liability. The complainant risks an unfavorable outcome, and in the cost-free administrative process, incurs transaction costs in delayed or missed opportunities because of the necessity to pursue a remedy and because of the legal hurdles and delay that result. The Commission, a tax supported agency, bears the transaction costs of processing cases and is under pressure to resolve increasing numbers of individual complaints as well as to undertake class actions. Consequently, the failure to process cases in a timely and effective way and the growth of an enormous backlog had hurt complainants, respondents, and the Commission itself and had discouraged others from coming forward to file complaints.

However, more was required than making the complaint process efficient.[38] Although inefficiency often had foreclosed fairness, efficiency

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36. Because most parties do not have lawyers, the Commission is under a special duty to help them understand the evidence and the legal standards by which it must be judged. For example, in the hypotheticals used here, it may be necessary to explain why promptness and attendance are job-related qualifications in judging competence for promotion, why success would be very difficult if it were shown that the men previously promoted had similarly good time and attendance records, or why it is more difficult to establish discrimination when the complainant and respondent are of the same race. In general, studies show better outcomes when mediators "identify and sharpen issues and propose agendas, trying to get people to engage with the issues in a productive way." *Researchers Interviewed-What We Know-And Don't Know-About Mediation*, DISPUTE RESOLUTION FORUM 9, 10 (Oct. 1989) (Dean G. Pruitt, researcher interviewed).

37. J. HENRY & J. LIEBERMAN, THE MANAGER'S GUIDE TO RESOLVING LEGAL DISPUTES: BETTER RESULTS WITHOUT LITIGATION 6-7 (1985).

38. Reported evidence of efficiency, without discussion of fairness, may encourage skepticism of ADR from those whose professional training, background, or experience leads them to doubt that less formal processes can render justice. As a tax-supported agency of the federal government, the EEOC felt an obligation to closely monitor and to regularly report on the functioning of the process and on the details of the results under the new system, as well as on additional steps taken toward improvement. Public confidence that

would not in itself produce fairness in a mass complaint system.[39] Nevertheless, the characteristics and goals of the complaint process of a discrimination agency suggested that fairness of outcome and efficiency of process were linked. This could be demonstrated by reference to three factors: processing time, remedy, and the release of resources to further unattended statutory obligations. The processing time as a proxy for efficiency, and the remedy as a proxy for fairness compared with the same indicators under the old system provided one way to assess the link. A relationship between fairness and efficiency also would exist if new processing methods released resources to meet statutory responsibilities to unserved victims and classes of discrimination.

Processing time, the number of days or months it took to resolve cases, was the obvious proxy for efficiency. An increase in the remedy rate and in dollar benefits provided a reasonable measure of fairness to both parties under the circumstances. The existing remedy rate was so low[40] that it was inconsistent with the statutory assumption that discrimination was widespread. Thus, the overwhelming foreclosure of remedies to complainants appeared to be unfair. An increase in remedies would indicate that the system was fairer than before when employers almost always prevailed.[41] Moreover, as I explain in Section III, an increase in reme-

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had been eroded by years of backlog could be restored only by documented evidence that the new procedures were producing improvements. The morale of a staff that had taken the brunt of public resentment could be restored only by evidence that a workable system was in place. Questions of fairness that streamlined procedures might disadvantage complainants could be put to rest only by timely evaluation of case results.

39. Investigations of the EEOC during most of the decade of the 1980's reported not only a return to inefficient case processing methods but also to a bifurcation between efficiency and fairness. Performance indicators were not tied to quality of results, such as percentage of claimants benefitted, as with RCP, but to numbers of cases closed. Official investigations reported that the focus on efficiency alone produced cases that were incompletely and incompetently investigated, yielding few remedies for complainants. *See generally* 1988 GAO Report, *supra* note 33. Inadequate investigations resulted in large part from pressure investigators felt to reduce case inventory. *Id.* at 3, 31-32. By 1986 the no cause rate for complainants' cases had risen to 59% from 32.1% in 1980, when RCP was used. *See generally* GENERAL ACCOUNTING OFFICE, EEOC BIRMINGHAM OFFICE CLOSED DISCRIMINATION CHARGES WITHOUT FULL INVESTIGATION (July 1987); *See also Hearings before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 98th Cong. 1st Sess. 114-18 (1983) (testimony of Nancy Kreiter, Women Employed). In addition, the backlog of cases climbed significantly. In 1986, the Commission had a 61,000 case backlog. *Hearing on Clarence Thomas of Missouri to be Chairman of the Equal Employment Opportunity Commission: Hearings before the Senate Committee on Labor and Human Resources*, 99th Cong., 2d Sess., at 79 n.157 (1986). *Compare infra* note 44.

40. *See supra* notes 19-21 and accompanying text.

41. *See supra* note 21.

dies at a saving in time and money to employers was consistent with the interests of employers in fairness.[42]

Changes in remedies and case processing time demonstrated that the new process had a measurable effect on the justice of the results.[43] Between 1976 (when the old system was in place) and 1980, the settlement rate, the effective remedy rate, tripled from fourteen percent to forty-three percent, the average dollar benefit to complainants more than doubled from $1400 to $3400 and the case processing time decreased from 24 months to 140 days.[44] Further, by the fall of 1981, the Backlog Charge Processing System had reduced the backlog by more the 100,000 cases.[45]

The dividends went well beyond early treatment of individual cases and backlog reduction. RCP allowed the EEOC to pursue justice in ways that had been foreclosed or delayed earlier by inefficiency. A greater number of individuals with complaints could be served. Equally important, with individual charges no longer claiming a disproportionate share of the Commission's resources, the EEOC was able to pursue class actions in a systematic way for the first time. A separate Systematic Charge Processing System was instituted, and 500 class charges were

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42. *See infra* notes 50-53 and accompanying text.

43. Before placing RCP in all its offices, the Commission tested the system in three model offices in Baltimore, Chicago, and Houston, diverse locations chosen to examine the effectiveness and replicability of the procedures under different conditions. First year results in the model offices showed a 65% increase in productivity with 96% more cases resolved than in the prior year, 133% more cases resolved than received, and an average processing time of 65 days. Dollar benefits to charging parties quadrupled from $1.0 million in 1977 to $4.2 million in 1978, and the number of complainants who received monetary remedies through RCP more than tripled, from 691 to 2,523. *Statement of Eleanor Holmes Norton before the Subcomm. on State, Justice, Commerce and the Judiciary of the Senate Comm. on Appropriations*, 96th Cong., 1st Sess. on H.R. 4392, pt. 2, March 19, 1979, p. 1497.

44. *Federal Enforcement of Equal Employment Opportunity Laws: Hearings before the Subcomm. on Equal Employment Opportunities of the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 114-18 (1983) (testimony of Nancy Kreiter, Women Employed). *See also* 1981 GAO report, *supra* note 31, at 4-7.

	1977	1980
Percentage of Settlements	14	47
Benefits (Monetary)	3,948,006	43,082,000
Number of people benefitted	2,007	29,251
Time for processing	2 years	140 days

Letter of Eleanor Holmes Norton to Gregory J. Ahart, Director of Human Resources, GAO, 1981 GAO Report 61 [hereinafter Norton letter, 1981 GAO Report].

45. *Oversight Hearings on Equal Employment Opportunity and Affirmative Action, Hearings before the Subcomm. on Equal Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong., 1st Sess. 336 (1981)(statement of J. Clay Smith, Jr., Acting Chairperson, EEOC).

filed by 1980.[46] An even larger number of class actions derived from individual charges were filed annually.[47] While individual cases will always be important, class actions are the primary tool for eliminating the phenomenon of discrimination, including the patterns that ensnare large numbers of people and that often feed the atmosphere that produces individual acts of discrimination as well.[48] Individual cases are rarely potent enough to effect these patterns.

The RCP reforms introduced a more efficient and more remedy-bearing method of resolving cases, leaving the traditional case processing system for cases that required an extended investigation, a cause finding, conciliation, and, in appropriate instances, a court suit. At the same time, the newly inserted process represented an acknowledgement of the reality that the existing undifferentiated system could not provide the necessary choices for resolution that the range of cases demanded. The results showed an improvement in efficiency, measured by reduction in case processing time and in backlog reduction, as well as greater fairness or justice, measured by the increase in remedies to complainants and the release of resources to additional individual cases and to broad-scale initiatives against discrimination.

III. THE UNDERLYING INTEREST IN JUSTICE

Significant differences in the structure, characteristics, and purposes of dispute processes cannot be accommodated if monolithic criteria are

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46. EEOC, Update/1980 (EEOC document on file at the Ohio State Journal on Dispute Resolution).

47. The Commission established two routes for bringing class action charges, one for large Commission-initiated charges brought through the Systematic Charge Processing System and another for class actions that came to the attention of the Commission through charges filed by individuals. The latter program, called Early Litigation Identification (ELI), greatly accelerated class action work. Between April 1979, when the program was initiated and September 30, 1979, there were 636 active ELIs. 1981 GAO Report *supra* note 31, at 10.

48. The importance of the class action mission was discussed in a U.S. Office of Personnel Management evaluation of the EEOC reforms: "In 1971, when Congress amended Title VII . . . it set [as] a high priority for EEOC's enforcement efforts as (sic) an attack on patterns and systematic discrimination activities in society. Now that the Commission has made remarkable progress in reducing backlog and refining procedures for timely resolving current individual charges, it is able to establish programs to meet the above high priority." L. W. TAYLOR & L. S. TAO, MANAGEMENT INITIATIVES AND EEOC'S IMPROVED PRODUCTIVITY 13 (Jan. 1981) (U.S. Office of Personnel Management, Case Management Information Series, Report No. 1). The Office of Management and Budget (OMB) also studied the RCP and backlog reduction procedures. *See* OFFICE OF MANAGEMENT AND BUDGET, MANAGEMENT SUCCESSES AND IMPROVEMENTS: TWO CASE EXAMPLES 1 (1980): "These changes have led to greatly improved performance . . . [which] should be of special interest to other agencies with responsibilities for investigating complaints from the public . . . ."

used to evaluate fairness. An interest-based analysis of outcomes that systematically focuses on whether the recognizable interests of parties are served provides a way to test the quality of justice of some dispute systems.

The evidence from RCP suggests that a consistency between improved efficiency and increase in remedies was achieved. Case processing time was significantly reduced while the dollar benefits received and the percentage of complainants benefitted were substantially raised.[49] Employers cooperated with a system that greatly increased the number of complainants who received settlements and more than doubled the average dollar amount they paid to complainants.[50] An interest analysis explains why the parties were willing to settle. A similar analysis can help answer the deeper question of whether justice was done.

In a dispute concerning rights, an employer and employee typically appear to have few interests in common. Their respective interests in justice would appear especially polarized. However, the usual contrast between opposing sides is mediated by the strong public policy that supports the elimination of discrimination through the vindication of individual rights in an administrative process structured to prefer settlement and conciliation. In this context, at least three common interests can be isolated as components of justice. They are an interest in efficiency; an interest in vindication, which is the tangible evidence that justice has been done; and an interest in reducing the risk of losing the case altogether. In reforming its approach to case processing in 1977, the EEOC sought to satisfy these interests.

First, experience had taught both complainants and respondents that they had a mutual interest in efficiency through timely processing. Complainants were almost always unsuccessful when their complaints were allowed to age.[51] Thus, delay alone contributed greatly to unjust results for complainants. Employers prevailed overwhelmingly in cases under the old system but incurred large transaction costs "paid" not to complainants but to the complaint processing system in the cost of producing numerous rounds of data, the use of supervisory and other personnel in that effort, lawyers' fees, and other costs associated with remaining for inordinate periods of time in the EEOC process. Delay and backlog therefore punished both parties in measurable terms, left each believing

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49. *See supra* notes 43-46 and accompanying text. Almost two-thirds of negotiated settlements included monetary relief, but other forms of relief, such as a neutral reference or expungement of records may have been even more valuable. *See* Norton letter, 1981 GAO Report, *supra* note 44.

50. *See* Norton letter, 1981 GAO Report, *supra* note 44.

51. *See supra* notes 19-21 and accompanying text.

that the process had failed as a justice system, and produced a mutual interest in timely processing.

Second, each party has an interest in vindication in some form because vindication translates into justice, particularly in discrimination cases. These cases are often inherently volatile not only on the merits, but also because of the long and troubled history of discrimination in this country. A complainant believing himself to be a victim of discrimination is likely to feel a deep need for vindication. An employer, wary of the possible effects of the accusation and confident of her judgment, is likely to feel a reciprocal need. As a result each seeks affirmation from the process. However, if the process proceeds to conclusion, only one party can prevail, and the interest of the other in vindication will be defeated. The high value that each attaches to vindication—or justice—therefore heightens the aversion to the risk that the claimant will be found to have been an unworthy employee rather than a victim of discrimination or that the employer will be found to have violated the statute.

Third, because both parties attach critical importance to vindication, they have a mutual interest in risk avoidance. Discrimination is difficult for the complainant to prove because the motives and actions of the respondent are seldom directly apparent. This heightens the risk to the complainant. However, before a definitive finding in favor of the respondent may be issued, the Commission must engage in the usual evidentiary methodology for testing the presence or absence of discrimination.[52] This increases the risk to the respondent.

Without a settlement, therefore, each party assumes the risk that she will not prevail in the case, a risk most parties desire to avoid. Moreover, this desire is consistent with the statutory mandate that prefers settlement to litigation and thus requires attempts to conciliate discrimination matters before litigation may be brought.[53] Even when Title VII cases are brought in court, the great majority do not go to judgment but are negotiated and settled out of court or through consent decrees.

A settlement that meets the parties' interests in timely processing, in vindication, and in risk avoidance is a just one, even though the parties do not have the same subjective interests. For complainants, RCP achieved a just result because it provided satisfactory vindication in a reasonable time period in a jurisdiction in which the necessary proof is

52. *See* McDonnell Douglass v. Green, 411 U.S. 792 (1973) (explaining the structure of proof for prima facie case of intentional discrimination).

53. *See* Civil Rights Act of 1964, § 706, 42 U.S.C. § 2000e-5. Even when discrimination agencies have full enforcement power, as the EEOC does not, they must usually attempt some form of voluntary settlement before proceeding to a formal adverserial hearing. *See, e.g.*, N.Y. HUMAN RIGHTS LAW § 297 (McKinney 1985).

elusive in the typical case. For employers, RCP provided a just solution because it resolved the complaints they had been winning in any case in an efficient and less costly way and avoided a finding of liability in others. In terms that could be measured—settlement rate and dollars for complainants, reduced transaction costs and an avoidance of a formal finding for respondents, and reduced processing time for both, the variated complaint system rendered a quality of justice superior to the one-dimensional traditional administrative process.

CONCLUSION

Nonfunctional dispute systems continue to be widely accepted in the United States. The toll that process conservatism takes on the quality of justice rendered by such systems needs investigation and analysis. An efficiency analysis of dispute systems is often done today. We know how to count the cases in court and administrative agency backlogs, how to assess case processing time, and how to figure transaction costs. Assessing the quality of justice, however, is not only more difficult; it is inherently problematic. The elements of a just system beyond the presence of due process mechanisms have not been systematically explored.

The EEOC used three crtiteria to assess whether the Rapid Charge Processing System, its alternative to traditional complaint processing, rendered justice. These were whether the interests or the parties in justice were met; whether the efficiencies of RCP released resources to commit to more broad scale efforts to reduce discrimination; and whether RCP enabled the Commission to process the complaints of still more individual complainants without accumulating backlog. Substantial improvements in the remedy rate and case processing time met the interest of complainants in justice. Reduction in transaction costs and time and avoidance of a formal finding met the interest of respondents in justice. The release of resources for class action work and for processing the complaints of others, who under the old system might have been hurt by delays in the process, met the needs of the unserved public as well as the public policy or larger justice goals of the statute.

In a discrimination case processing system, which must handle tens of thousands of individual cases a year, settlements that benefit complainants are a reasonable trade-off for a reduction in transaction costs to the employer; this calculation assures that cases are not simply closed in the interest of efficiency without the appropriate concern for justice. This trade-off is also fair to respondents, who understand the needs of their own workplace or have lawyers to advise them concerning the risk of liability and who are fully equipped to assess the appropriateness of the trade-off and to protect themselves against unjust results. Employers rou-

tinely engage in such calculations and overwhelmingly decide to settle legal matters that arise in other aspects of their work.

Securing justice in dispute systems should not simply be an aspirational ideal. Nor is it an automatic benefit of traditional dispute systems. Justice, when viewed as a product of justice systems, is still largely an imponderable of the mechanisms established to provide it. Justice is debated, not defined. It is assumed to result from formal systems and suspected of falling short in informal systems.

What is at stake is too important for such casual measures, assumptions, or suspicions. Driven by the growing pressure of the mounting volume and complexity of matters, first alternative methods, and now alternative systems are being developed. These alternatives may sometimes be more efficient and less costly, but little is known about the justice they presumably are established to render. Equally important, too much is assumed about the quality of the justice rendered by inefficient traditional systems. At bottom is the question of whether due process alone is a sufficient guarantee of justice when the justice mechanism itself is highly inefficient or essentially nonfunctional. The absence of generic measures or other criteria for assessing the quality of justice does not relieve us of the obligation to develop measures that fit the particular systems in use, whether formal or informal.